

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

Martin
PK-II
31371

FILE: B-216381 DATE: June 6, 1985
MATTER OF: Aerodyne Systems Engineering Ltd.

DIGEST:

1. Where protester protests to the agency within 10 working days of the agency's rejection of its technical proposal, its subsequent protest to GAO within 10 working days of the agency's denial of its protest is timely.
2. Protest of the agency's rejection of the protester's technical proposal for noncompliance with a mandatory requirement contained in "Attachment 1" to the solicitation, when the solicitation referred only to "Attachment D1," is denied. The RFP and its amendments, when read as whole, clearly conveyed the agency's intent that proposals must comply with the requirement in order to be acceptable.
3. Where the RFP required that a target helicopter be based on a small, commercially available, two-person civilian helicopter, a protest contending that the awardee's target helicopter was based on a five-person helicopter is denied since the record indicates that awardee's proposed target helicopter was based on a small, commercially available, two-person civilian version of its five-person helicopter.

Aerodyne Systems Engineering Ltd. protests the award of a contract by the Department of the Army to Hynes Aviation Industries, Inc. under request for proposals (RFP) No. DAAH01-84-R-0168 for four "TEST AND EVALUATION ROTARY-WING TARGET" (TERT) helicopters, with an option for six more. We deny the protest.

032225

Aerodyne contends that its proposal was improperly rejected for failure to base its TERT on a small, commercially available, two-person civilian helicopter. Aerodyne insists this was not a critical requirement under the specified evaluation factors. Aerodyne also alleges that Hynes' proposal was based on a five-person helicopter and thus itself did not comply with the RFP requirements. In addition, Aerodyne alleges that Hynes' proposed helicopter does not meet the specifications for diameter of the main rotor, overall fuselage length, rate of climb and hovering ceilings.

Background

The RFP, which was issued on March 30, 1984, stated in Attachment 1, entitled "Technical Requirement," that the TERT "shall be based on a small, commercially available two-person civilian helicopter but shall be furnished in a drone flight-only configuration." This attachment also set out the specifications that the TERT would have to meet after the helicopter on which it was based was modified. The evaluation criteria in section M-3 listed several "critical" technical items and stated that the failure to meet any one of them could result in the proposal being classified as unacceptable. The requirement in Attachment 1 that the TERT be based on a small, commercially available, two-person civilian helicopter was not listed as a critical item in Section M-3.

Proposals were received on June 15. Aerodyne offered to furnish a TERT based on a military helicopter that was already in a drone configuration, and to modify it as required by the specifications. In a letter to Aerodyne dated July 20, the agency stated that Aerodyne's proposal indicated that its proposed TERT was based on a drone that was not yet commercially available and asked Aerodyne to explain how its drone complied with the requirement that the TERT be based on a small, commercially available, two-person civilian helicopter.

Aerodyne replied that there was no commercially available two-person helicopter designed to meet the specifications of this procurement without major modifications, that the TERT built to such specifications would bear little resemblance to any existing commercially available helicopter, and that it was irrelevant whether the helicopter on which the TERT was based was for two people or not,

since people would not be transported in the TERT. Aerodyne also stated that although its proposal said that the drone was not yet commercially available, this was so only in the sense that it was not an off-the-shelf item but that, in fact, the drone was commercially available on special order.

By letter of August 17, the agency notified Aerodyne that its proposal was technically unacceptable because its TERT was not based on a small, commercially available, two-person civilian helicopter. The letter also stated that this was required because such a helicopter would already have been certified by the Federal Aviation Administration (FAA), thereby eliminating the need for research and development testing as would be required if Aerodyne's drone was modified to comply with the specifications.

Preliminary Matters

The agency argues that as Aerodyne was informed by letter of August 17 that its proposal had been rejected, but did not protest until September 12, its protest is untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1984), which required that a protest be filed with our Office within 10 working days after the basis for protest is known, or should have been known.

When, however, a protest is filed initially with the contracting agency, we will consider a subsequent protest to our Office filed within 10 working days of notification of initial adverse agency action, if the original protest was timely filed. 4 C.F.R. § 21.2(a). Here, the record indicates that Aerodyne called the agency on August 23 and sent a telegram on the same day notifying the agency that it was "appealing the disqualification" and would send additional information within 5 days. The telegram was confirmed by letter of August 24, which stated that Aerodyne would forward a detailed brief "in support of our protest." On September 4, Aerodyne delivered the details of its protest to the agency. The agency's denial of September 10 was protested to our Office on September 12; the protest is therefore timely and will be reviewed on its merits. See Radiation Systems, Inc., B-211732, Oct. 11, 1983, 83-2 CPD ¶434.

To the extent, however, that Aerodyne argues that there was no reasonable basis for the base helicopter requirement, its protest is untimely since it did not protest on this ground before the closing date for receipt of proposals. See 4 C.F.R. § 21.2(b)(1). While Aerodyne argues that the requirement was not "critical," the requirement was apparent on the face of the solicitation, and therefore Aerodyne's objections to its reasonableness had to be protested prior to the closing date for receipt of proposals in order to be timely. Id.

Rejection of Aerodyne's Proposal

Aerodyne contends that the rejection of its proposal as technically unacceptable for failing to base its TERT on a small, commercially available, two-person civilian helicopter was improper because the requirement was not a critical evaluation factor, and its drone will meet the specifications for the TERT. Aerodyne does not argue, however, that its drone meets the requirement for the helicopter on which the TERT must be based. In fact, Aerodyne stated in the letter to the agency, containing the details of its protest, that if the utilization of a commercially available, two-person helicopter was a critical requirement, its proposal would be technically unacceptable.

Aerodyne contends that the requirement was not critical because the paragraph in Attachment 1, where it appeared, is captioned "General," and because it was not incorporated into the RFP's evaluation provision (M-3) as a critical factor. Aerodyne also maintains that section L-21 of the RFP, which required that in order to be acceptable, proposals must reflect a complete understanding "of the requirements of the scope of work (SOW), Attachments D1 and D2," did not incorporate the base helicopter requirement in Attachment 1, because it did not refer to Attachment 1. Thus, Aerodyne insists that it was free to base its TERT on its drone.

We think that Aerodyne's arguments are overly literal and without legal merit. There were no Attachments D1 and D2 to the RFP, but there were Attachments 1 and 2, and the preproposal questions and answers that were incorporated into the RFP by amendments refer several times to the Technical Requirement and Attachments 1 and 2, not to Attachments D1

and D2. Both the requirement for the helicopter on which the TERT must be based and the design and performance specifications for the TERT were contained in Attachment 1. Although only Attachment 2 was entitled "Scope of Work,"^{1/} we believe it is obvious that the reference in section L-21 to the SOW, Attachments D1 and D2, was meant to include both Attachment 2 and Attachment 1, the Technical Requirement. Further, by its use of the word "shall," the Technical Requirement clearly established the requirement that the TERT be based on a commercially available, two-person civilian helicopter as mandatory and we know of no reason why a mandatory requirement cannot be listed under a heading of "General." Moreover, before listing the critical and noncritical evaluation factors, section M-3 provided that the proposal evaluation would be made "in accordance with the performance specifications and the [SOW]."

We have held that solicitations must be interpreted as a whole, and whenever possible, effect must be given to each word, clause, or sentence. JVAN, Inc., B-202357, Aug. 28, 1981, 81-2 CPD ¶ 184. Acceptance of Aerodyne's position is inconsistent with this rule and would lead to the unreasonable conclusion that the agency, by not repeating the base helicopter requirement in the evaluation provision, intended to make the otherwise mandatory requirement a matter of discretion. Accordingly, we find no merit to this position. Rather, we find that read as a whole, the RFP clearly conveyed the agency's intent that only those proposals whose TERTs were based on a small, commercially available, two-person civilian helicopter would be considered technically acceptable.

Acceptance of Hynes' Proposal

Aerodyne also argues that if the requirement that the TERT must be based on a small, commercially available, two-person helicopter is mandatory, then the agency acted unfairly and improperly by accepting Hynes' proposal, which allegedly is based on a five-person helicopter. Because Aerodyne did not have access to Hynes' proposal, Aerodyne's protest also devotes considerable discussion to the possibility that Hynes offered its model 2B2. Hynes, however, did not in fact offer this model as the base, and therefore we need not address Aerodyne's allegations that the model 2B2 does not meet critical RFP requirements.

^{1/} Attachment 2 specified the engineering documentation required from the contractor after award.

In support of its contention, Aerodyne has submitted a Hynes' news release announcing that it had been awarded a contract to furnish new model H-5 helicopters, and stating that the H-5 is certified to carry five persons, but for this contract will carry a full load of electronic equipment. Aerodyne contends that there is no FAA certified H-5 helicopter, but that there is a certified Brantley-Hynes Model 305, which is the model pictured in a news article about the award to Hynes for H-5 helicopters. Aerodyne also has submitted an extract from Jane's "All the World's Aircraft" (1980-81 ed.) describing Hynes' model 305 as a five-seat light helicopter. Aerodyne argues that if the Hynes' TERT was based on a five-person helicopter, the contracting officer must have authorized an exception to the two-person requirement, and contends that the five-person model would not comply with the other specifications.

Hynes' proposal in fact offered to modify its "model H-5, also known as the model 305." Hynes denies, however, that it based its TERT on a five-person helicopter and explains that it holds two FAA certificates under which it has developed more than 40 model variations. Hynes states that it will base the TERT on its two-seat version of its model H-5, which is one of the many models developed under certificate No. H3SW. Hynes contends that the description in Jane's of its model 305 is irrelevant because the model described in Jane's is not the variation Hynes proposed as the base for its TERT.

Although the agency concedes that the helicopter model on which the Hynes' TERT is based is capable of carrying more than two persons, it emphasizes that Hynes based its TERT on a two-person configuration of that model. The agency states that there were two other proposals also based on helicopters capable of carrying more than two persons, although one was found to be unacceptable for other reasons. The agency insists that no proposal, including Aerodyne's, was rejected for offering a TERT based on a helicopter capable of carrying more than two persons.

Aerodyne acknowledges that one helicopter model can have several seat configurations and that a helicopter with a high gross weight capability could be reconfigured to carry less passengers for more passenger comfort. Aerodyne contends, however, that it is well understood in the

aviation industry that reference to the number of seats in any aircraft is the maximum configuration, and that reference to a two-person or five-person helicopter means the maximum seating certified by FAA. Aerodyne, thus, argues that the requirement for a two-person helicopter restricted the offerors to a helicopter capable of carrying no more than two passengers.

Contracting officials enjoy a reasonable degree of discretion in the evaluation of proposals for acceptability, and we will not substitute our judgment for that of the procuring agency unless the agency's action was arbitrary or in violation of procurement statutes and regulations. Rack Engineering Co., B-214988, Sept. 10, 1984, 84-2 CPD ¶ 272. In addition, it is well established that the protester has the burden of affirmatively proving its case. H.E. Cramer Co., Inc., B-212015.2, Jan. 24, 1984, 84-1 CPD ¶ 111. Although Aerodyne insists that, in the aviation industry, reference to a two-person helicopter means a helicopter that can carry a maximum of two persons, Aerodyne has submitted no evidence in support of this allegation. We therefore find that Aerodyne has not met its burden of proof, and we will not question the agency's conclusion that a helicopter configured to carry two persons met the RFP requirement for a two-person helicopter, even though the same helicopter also could be configured to carry five persons.

In this connection, we also note that the agency states that Aerodyne's proposal was not rejected for noncompliance with the two-person requirement, but instead for not meeting the requirement that the base helicopter be commercially available. Aerodyne contends that its base helicopter is commercially available, but again offers no proof of its contention. Where conflicting statements of the protester and the agency are the only evidence available on an issue, we will accept the agency's version of the facts. See FMI-Hammer Joint Venture, B-206665, Aug. 20, 1982, 82-2 CPD ¶ 160. Accordingly, even if we view the agency's position concerning the two-person requirement as a relaxation of the requirement, Aerodyne was not prejudiced since its base helicopter was not acceptable in any event.

With regard to Aerodyne's contention that the helicopter on which Hynes based its proposed TERT does not meet the RFP specifications for diameter of the main rotor, fuselage length, rate of climb and hovering ceilings, we

B-216381

point out that there are no specifications in the RFP for the base helicopter, other than that it be a small, commercially available, two-person civilian helicopter. The other specifications in the RFP pertain to the TERT, not the helicopter on which it will be based. Furthermore, because the TERT will be used for military purposes, there is no requirement, as Aerodyne alleges, that the TERT obtain FAA certification as to airworthiness.

Conclusion

Under all the circumstances, we find no impropriety in either the agency's acceptance of Hynes' proposal or its rejection of Aerodyne's proposal.

The protest is denied.

for Seymour E. Hynes
Harry R. Van Cleve
General Counsel